

**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

ALLIANCE FOR RETIRED
AMERICANS; DOUG BORN; DON
BERRY; and VOTE.ORG,

Plaintiffs,

v.

MATTHEW DUNLAP, in his official
capacity as the Maine Secretary of
State; and AARON FREY, in his official
capacity as the Maine Attorney
General,

Defendants,

DONALD J. TRUMP FOR PRESIDENT,
INC.; REPUBLICAN NATIONAL
COMMITTEE; NATIONAL
REPUBLICAN SENATORIAL
COMMITTEE; and REPUBLICAN
PARTY OF MAINE,

Intervenor-
Defendants.

Docket No. KEN-20-262

**MOTION TO EXPEDITE APPEAL AND MODIFY BRIEFING
SCHEDULE**

Appellants Alliance for Retired Americans, Doug Born, Don Berry, and
Vote.org move to expedite consideration of this appeal and to shorten the
briefing schedule pursuant to Rule 7(b)(4).

Like all other states, Maine is about to conduct its first general election during a global pandemic. Maine has recognized that, in this environment, voting by mail is the safest method for all voters. This is especially true for Maine's substantial elderly population, for whom the coronavirus poses the most immediate risk.

Alarming, however, two aspects of Maine's election laws stand to burden and disenfranchise thousands of its absentee voters this November: its requirement that mail-in absentee ballots be received by 8:00 PM on Election Day, no matter how timely the voter was in mailing their ballot (the "Election Day Receipt Deadline"), and its failure to provide adequate notice and a meaningful opportunity to cure absentee ballots that are submitted with perceived errors.¹ In the past several general elections, when a relatively small number of Mainers have voted absentee, these two practices have disenfranchised thousands of Mainers. This year, when absentee voting has become the fail safe for accessing the franchise, the outlook is far worse: Secretary Dunlap has estimated that at least 600,000 Mainers will vote absentee in November, and *many* of those ballots, if not the majority, will be cast by mail. Indeed, on the first day that Mainers could request absentee

¹ Below, Appellants challenged six features of Maine's election system for the November 2020 election. Appellants now appeal the decision below only as to two of those features—the Election Day Receipt Deadline, and the cure procedures for absentee ballots.

ballots, 2,000 online requests were made in just the first hour and nearly 20,000 online requests were received by the end of the day. This compares to only 140 online requests during the entire first day that absentee ballots were available in 2016. Commenting on the strain this unprecedented demand is placing on election officials, Secretary of State Dunlap stated, with a dose of humor while under fire, “It’s the candy factory episode of ‘I love Lucy’ We’re just trying to keep up.”²

Below, Appellants submitted extensive evidence of the disenfranchising effects of Maine’s Election Day Receipt Deadline, which has disenfranchised thousands of Mainers in recent elections. The Deadline will disenfranchise far more this year, in part because of the surge in voting by mail, and in part because each mail ballot will be at the mercy of a strained United States Postal Service (“USPS”). At the hearing on Plaintiffs’ Motion for a Preliminary Injunction, Ronald Stroman, the former Deputy General Postmaster of the USPS, testified that Maine’s statutory deadline for requesting absentee ballots—five days before Election Day—created a high and imminent risk that absentee ballots would not be returned in time to be counted by Election Day. Mr. Stroman also testified that USPS is facing significant operating delays as a result of both the pandemic and new

² Dione Searcy, *When Your Job is To Make Sure Nov. 3 Isn’t a Disaster*, N.Y. TIMES (Oct. 1, 2020).

changes in USPS administration. What's more, Maine itself recognizes that USPS delays pose an immediate risk to the election. Indeed, the state sued USPS in August in anticipation that mail delays would disenfranchise voters whose ballots would not be sent or received in time to be counted. While Maine won preliminary relief in that lawsuit, there is little evidence that USPS can right the ship in just four short weeks—that is, in time to make a difference for the November election.³

Despite this evidence, the Superior Court below denied Plaintiffs' Motion for a Preliminary Injunction, holding that the Election Day Receipt Deadline did not impose an unconstitutional burden on voters this year. That decision is inconsistent not only with the evidence that was presented, but also with the decisions of courts across the country that have ordered state election officials to count ballots that are postmarked by Election Day and received within a short timeframe thereafter to avoid the disenfranchising effects of election day receipt deadlines this year. *See Pennsylvania Democratic Party et al. v. Boockvar, et al.*, No. 133-MM-2020 at 36-37 (Pa. Sept. 17, 2020) (recognizing the disenfranchising effects of Pennsylvania's

³ As Appellants will explain in more detail in future briefing, Maine's lawsuit against USPS cannot resolve USPS worker shortages due to COVID-19, as Mr. Stroman testified to in the hearing below. Nor can USPS restore machines which have already been dismantled, as USPS recently told a federal district court. *See State of Washington et al. v. Trump et al.*, No. 1:20-cv-03127-SAB, ECF No. 83 at 16-17 (E.D. Wash. Sept. 23, 2020).

Election Day receipt deadline for this general election, and ordering Pennsylvania election officials to count absentee ballots that are postmarked by Election Day and received within three days of Election Day); *Michigan Alliance for Retired Americans et al. v. Benson, et al.*, No. 20-000108-MM at 9-13 (Mich. Ct. Cl. Sept. 18, 2020) (holding Michigan's Election Day receipt deadline unconstitutional for this general election, and ordering Michigan election officials to count absentee ballots that are postmarked by Election Day and received within fourteen days after Election Day); *Democratic National Committee et al. v. Bostelmann et al.*, No. 3:20-cv-00249, ECF No. 538 at 47-51 (W.D. Wisc. Sept. 21, 2020) (holding Wisconsin's Election Day receipt deadline imposed an unconstitutional burden on voters for this general election, and ordering Wisconsin election officials to count absentee ballots that are postmarked by Election Day and received within six days of Election Day); *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986-ELR, ECF No. 134 (N.D. Ga. Aug. 31, 2020) (holding Georgia's Election Day receipt deadline imposed an unconstitutional burden on voters for this general election, and ordering Georgia election officials to count absentee ballots that are postmarked by Election Day and received within three days of Election Day); *Common Cause of Indiana et al. v. Lawson, et al.*, No. 1:20-cv-02007 (S.D. Ind. Sept. 29, 2020) (holding

Indiana’s Election Day receipt deadline imposed an unconstitutional burden on voters for this general election, and ordering Indiana election officials to count absentee ballots that are postmarked by Election Day and received within ten days of Election Day); *LaRose v. Simon*, 62-CV-20-3149 (Minn. Dist. Ct. Aug. 3, 2020) (authorizing consent decree enjoining Minnesota’s Election Day receipt deadline for this general election, and requiring Minnesota’s election officials to count absentee ballots that are postmarked by Election Day and received within seven days after Election Day); *North Carolina Alliance for Retired Americans et al. v. North Carolina State Board of Elections*, No. 20-CVS-8881 (N.C. Sup. Ct. Sept. 22, 2020) (consent decree enjoining North Carolina’s Election Day receipt deadline for this general election, and requiring North Carolina election officials to count absentee ballots that are postmarked by Election Day and received within nine days after Election Day).

There is no reason to think that voters in Pennsylvania, Michigan, Wisconsin, Georgia, Indiana, Minnesota, and North Carolina are at great risk of being disenfranchised by their state’s Election Day receipt deadlines, but Mainers are not. Simply put, Mainers are at risk too. As one court explained, “mail delays and the COVID-19 pandemic stack the deck” against voters this year—even for those voters who make their best effort to return their ballot

on time. *Michigan Alliance for Retired Americans*, No. 20-000108-MM at

11. Appellants urge this Court to expedite this appeal to ensure that an unprecedented number of voters are not disenfranchised this year for reasons wholly outside their control.

Separately, Appellants ask this Court to expedite this appeal to consider a second critical issue—whether Mainers will have an adequate opportunity to cure absentee ballots that are submitted with perceived errors in time for those ballots to be counted. In June, when Appellants filed this suit, Maine statutes did not require election clerks to notify voters of perceived errors with their absentee ballots or provide voters with an opportunity to cure those ballots. In September, in response to this suit, the Secretary issued new guidance, requiring clerks to make a good-faith effort to notify voters of errors after the error is discovered. But under this guidance, voters are only given until 8:00 P.M. on Election Day to cure their ballot. As Appellants' expert showed, because tens of thousands of ballots will not be received until shortly before Election Day (or until Election Day itself), many voters will not have an adequate opportunity—or any opportunity at all—to cure those ballots, in large part because elections officials may not discover those errors until it is too late.

While the Superior Court held that this cure regime was adequate, Appellants respectfully submit that this cure regime is plainly unconstitutional. Indeed, many courts in the past several months have ordered election officials to give voters a post-election period for voters to cure absentee ballots, recognizing that an Election Day cure cutoff necessarily means that some voters have no opportunity to cure. *See Ariz. Democratic Party v. Hobbs*, 2020 WL 5423898 (D. Ariz. Sept. 10, 2020) (granting preliminary injunction and ordering Arizona election officials to provide voters with seven days after Election Day to cure absentee ballots with missing signatures); *League of Women Voters of New Jersey et al. v. Tahesha Way*, No. 20-cv-05990, ECF No. 34 (E.D.N.J. June 17, 2020) (granting preliminary injunction and ordering New Jersey election officials to allow voters to cure absentee ballots with missing or mismatched signatures for sixteen days after Election Day); *Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 WL 3068160 (D.N.D. June 5, 2020) (holding North Dakota's cure procedures for absentee ballots violated due process and ordering North Dakota's election officials to allow voters six days after Election Day to cure their absentee ballot); *Frederick v. Lawson*, No. 1:19-cv-0959-SEB-MJD, 2020 WL 4882696, (S.D. Ind. Aug. 20, 2020) (permanently enjoining Indiana election officials from rejecting any

absentee ballot because of perceived signature mismatch absent adequate notice and cure procedures to the affected voter); *North Carolina Alliance for Retired Americans et al. v. North Carolina State Board of Elections*, No. 20-CVS-8881 (N.C. Sup. Ct. Sept. 22, 2020) (consent decree requiring North Carolina election officials to provide nine days after Election Day for voters to cure absentee ballots); *League of Women Voters of the United States et al. v. Kosinski, et al.*, No. 1:20-cv-05238, ECF No. 37 (S.D.N.Y. Sept. 17, 2020) (consent decree requiring New York election officials to provide five days for voters to cure absentee ballot after voter is notified of the need to cure the ballot).

Appellants are confident that this Court will determine the Superior Court erred both as to Maine's Election Day Receipt Deadline and cure procedures. But if this matter is not expedited, any such decision would necessarily come too late for Appellants—and for Maine voters—to obtain relief in time for the November 3, 2020 general election. Notably, this Court has historically granted expedited consideration of appeals that must be resolved in advance of elections. *See, e.g., Hammer v. Sec'y of State*, 2010 ME 109, ¶ 4, 8 A.3d 700 (expediting the proceeding due to the proximity of the upcoming election); *LaMarche for Governor Comm. v. Comm'n on Governmental Ethics & Election Practices*, 2006 ME 126, ¶ 1 n.1, 908 A.2d

1205 (“Because resolution of these issues before the November 7, 2006, election is important, we granted LaMarche’s motion to expedite the appeal.”); *Finks v. Sec’y of State*, 647 A.2d 402, 402 (Me. 1994) (expediting consideration of appeal of order that candidate for governor met constitutional residency requirement).

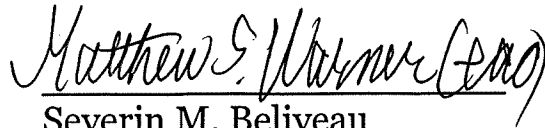
Appellants therefore request the briefing schedule be set as follows:

- a. Appellants’ Brief and the Appendix is to be filed by Monday, October 5, 2020.
- b. Appellees’ Brief is to be filed by Friday, October 9, 2020.
- c. Appellants’ Reply Brief is to be filed by Tuesday, October 13, 2020.

Appellants contacted today counsel for the Secretary of State and counsel for the Intervenor-Defendants but, due to the short timeframe, do not yet know the parties’ position on this motion.

Dated this 1st day of October, 2020.

Respectfully submitted,



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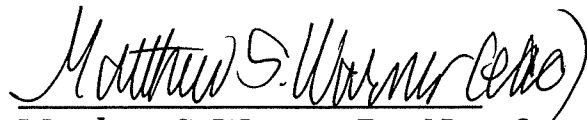
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CERTIFICATE OF SERVICE

I certify that on October 1, 2020, this document was filed with the Court by hand delivery, and was e-mailed to Thomas Knowlton, Esq., Phyllis Gardiner, Esq., and Jason Anton, Esq. attorneys for the Secretary of State, Patrick Strawbridge, Esq., attorney for the Intervenor-Defendants, and Zachary Heiden, Esq., attorney for the amicus curiae ACLU of Maine

A handwritten signature in black ink, reading "Matthew S. Warner (Esq.)", written over a horizontal line.

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